No. 79-1679

In the Supreme Court of the United States

OCTOBER TERM, 1979

WASTE MANAGEMENT OF WISCONSIN, INC.,

Petitioner,

vs.

CYNTHIA FOKAKIS,

Respondent.

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I.

THIS COURT RECENTLY REAFFIRMED THAT HABEAS CORPUS IS NOT THE SOLE REMEDY FOR RELIEF FROM AN UNCONSTITUTIONAL CONVICTION.

Respondent, at pages 4-6 of her brief, misinterprets the holding of this Court in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), to be that habeas corpus is the exclusive method for challenging all state court convictions in federal court. All *Preiser* held was that for persons *in custody,* habeas corpus was the exclusive remedy avail-

able. That result followed a determination that while both habeas corpus and 42 USC §1983 relief were conceptually available to prisoners, the more specific applicability of habeas corpus must override the more general applicability of §1983. 411 U.S. at 490.

The reasoning of *Preiser* was never intended to, and logically could not, affect challenges from petitioners not in custody. Furthermore, this Court has never held that other forms of relief from unconstitutional convictions could not be utilized by those to whom habeas corpus is unavailable. Indeed, just this term the opposite view was renewed.

In *Lewis* v. *United States,* ..... U.S. ....., 26 Crim. L. Rptr. 3095, 3098 (1980) this Court cited *United States* v. *Morgan,* 346 U.S. 502 (1954) for the proposition that a person who has been convicted of a felony can obtain relief from his conviction even though he is no longer in any custody. The specific issue in *Morgan* was whether federal habeas corpus (28 U.S.C. §2255) was intended by Congress to be the exclusive remedy available to a felon to attack a federal criminal conviction. Morgan had completely served his sentence and sought relief from his conviction by commencing an action for a writ of *coram nobis.* This Court held that the convicted felon could obtain relief even though he was not in custody at the time of the commencement of his action. The Court stated:

> "The contention is made that § 2255 of Title 28, U.S.C., providing that a prisoner 'in custody' may at any time move the court which imposed the sentence to vacate it, if 'in violation of the Constitution or laws of the United States,' should be construed to cover the entire field of remedies in the nature of coram nobis in federal courts. We see no compelling reason to reach that conclusion. In United States v. Hayman,

> 342 U.S. 205, 219, we stated the purpose of § 2255 was 'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction. We added: 'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.' We know of nothing in the legislative history that indicates a different conclusion. We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion." *Id.* at 510-511.

The analogy is clear. The existence of habeas corpus to review state court convictions of those *in custody* should have no more effect upon those *not* in custody and to whom the habeas remedy is therefore not available than is the case for those suffering from federal court convictions. Section 1983 actions for non-custody state defendants, like *coram nobis* or other collateral actions for non-custody federal defendants, should be allowed to proceed, at least where, as here, all state remedies have been exhausted. The reaffirmation of *Morgan* in *Lewis* underscores that concept and exposes the Seventh Circuit's error in concluding that there is no federal remedy for those suffering unconstitutional state court convictions who are not in custody.

II.

THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL ARE INAPPLICABLE.

The final argument in the Respondent's Brief has to do with what is claimed to be a proposed application of "normal rules of res judicata and/or collateral estoppel." (Respondent's Brief p. 9.) The Respondent asserts that the Petitioner "was provided with an opportunity to fully and fairly litigate its federal constitutional claims in the

state courts, and it chose to do so," and that the Wisconsin Supreme Court afforded "plenary consideration" to those claims. (Respondent's Brief pp. 9-10.) Consequently, the argument continues, Petitioner should not be allowed to reassert those claims in a "collateral federal action." (Respondent's Brief p. 10.)

The short and definitive answer to this argument, of course, is that it ignores the status of the action and is improper. The case reached the court of appeals and this Court when a motion to dismiss was granted at the district court level. Consequently, the allegations of the complaint are to be taken as true. The court of appeals clearly recognized that and further clearly recognized that those allegations do indeed assert a denial of an opportunity by the state trial court to fully and fairly litigate federal constitutional claims as well as a failure on the part of the state trial and appellate courts to recognize or vindicate certain federal constitutional rights. As a matter of law and procedure, therefore, the position taken by the Respondent in this regard is without merit as well as improper.

As a practical matter, however, the position taken by the Respondent in this regard is actually demonstrative of the Petitioner's complaints. It should be noted that the Respondent's statements in the brief are in fact being made by the Office of the Attorney General for the State of Wisconsin. It was that same office which prosecuted the state criminal case, represented the state before the Wisconsin Supreme Court, and represented the state in response to the original petition for certiorari following the Wisconsin Supreme Court's affirmance of the trial court's judgment of conviction. It is conduct of the attorney general's office during the prosecution which is intimately involved in the denials of federal constitutional rights alleged to have occurred at the trial level. The

inconsistent positions taken by that office since that time not only have obfuscated the issues but also have aggravated the denials of federal constitutional rights.

When the federal constitutional challenges to the trial court conduct and trial level events were presented to the Wisconsin Supreme Court, the attorney general's office argued that there were no such denials. The Wisconsin Supreme Court refused to fully and fairly consider the federal claims made, stating that it was "not a performing bear, required to dance to each and every tune played on an appeal", and that "any of the twenty-nine issues raised and not discussed . . . can be deemed to lack sufficient merit or importance to warrant individual attention." *State* v. *Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564; 261 NW 2d 147 (1978).

When the Petitioner sought a writ of certiorari concerning that decision of the Wisconsin Supreme Court, the attorney general's office, facing an obvious problem with the Wisconsin Supreme Court's stated refusal to address federal constitutional claims, argued that the Petitioner had failed to raise them. Hence, the Wisconsin Supreme Court's failure to decide them was said to be appropriate. *Waste Management of Wisconsin, Inc. d/b/a City Disposal Company* v. *State of Wisconsin*, Case No. 78-153, October term, 1977, Brief of Respondent in Opposition, Pages 2, 3-4.

As it now suits the State's interest in continuing the avoidance of consideration of the federal claims and in blocking access to a forum for said consideration, the office of the attorney general has blatantly stated that the Petitioner fully and fairly litigated its federal constitutional claims in the state courts and that the Wisconsin Supreme Court properly considered those claims. (Respondent's Brief, pp. 9-10.) The position of the office of the attorney general is demonstrative of the lack of fairness involved in the state court proceedings.

CONCLUSION

On the basis of the original petition and this reply, the petitioner respectfully requests that the Court grant its petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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